NO. 2587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE BRIGHT, et al.,
Plaintiff in Error.

vs.

VIRGINIA AND GOLD HILL WATER COMPANY (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

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FRANK D. MONCKTON, Clerk.

By_____Deputy Clerk.

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This is an action at law for damages, and not a suit in equity. In the Federal Court, the rule is, if a party has a plain, speedy and adequate remedy at law, equity jurisdiction will not lie,

Sec. 723 R. S. Stat. U. S.

And where the suit is one for the recovery of a money judgment the action is one at law.

Whitehead vs. Shattuck, 138 U. S. 151.
Northern Pacific vs. Amacker, 49 Fed. 537.
Parkersburg vs. Brown, 106 U. S. 500.
Ambler vs. Chateau, 107 U. S. 586.
Borzard vs. Houttan, 119 U. S. 352.

Wagner vs. Drake, 31 Fed. 849.
Hemsley vs. Meyers, 45 Fed. 287.
Willis vs. Knapp, 39 Fed. 592.
Frey vs. Willoughky, 63 Fed. 865.
Scott vs. Neeley, 140 U. S. 106.

The action is therefore one at law, and if not then no demurrer would lie, because, by the new rules in equity (Rule 29 P. 889, Montgomery's Manual), adopted by Supreme Court U. S. February 1st, 1913.

II

But is it claimed, that the action is within the Statute of Frauds, because relating to an interest in land. But the complaint nowhere claims that Plaintiff or her predecessors sold or assigned or transferred or agreed to transfer any interest in land, or that Defendant sold, assigned or transferred any interest in land, so that an interest in land does not anywhere appear in the complaint, and upon this point, the complaint comes within the following cases:

Bates vs. Babcock, 95 Calif. 479.
Sec. 1258 Elliott on Contracts, Vol. 2.
Sec. 1261 Elliott on Contracts, Vol. 2.
Croke vs. Am. Nat. Bank, 40 Pac. 229.
De Graffedreid vs. Savage, 47 Pac. 902.
Tyson vs. Despain, 43 Pac. 1039.

III

But it is claimed the contract could not be performed, within one year. **Why?** All that had to

be done, was to furnish the water, and the Plaintiff to use the same for irrigation. This could be done, and was done, within one year. The fact that this was to go on indefinitely does not bring the case within the Statute of Frauds.

Sec. 1277 Elliott on Contracts, Vol. 2.
Nestor vs. Diamond, etc., 143 Fed. 72.
Wehner vs. Bauer, 160 Fed. 240.
Jones vs. Patrick, 140 Fed. 403.

But even if the oral contract was originally within the Statute of Frauds, the Defendants cannot now complain, because the contract has long since ceased to be executory, and has for forty years been acted upon and executed, and the rights of the parties have become fixed, and neither can raise the issue of the Statute of Frauds.

Brown, Statute of Frauds, Section 116, says:

"When the contract has been in fact, completely executed on both sides, the rights, duties and obligations of the parties, resulting from such performance stand unaffected by the Statute."

In Cartin vs. David, 18 Nevada, 310, Judge Hawley says, "Moreover, the contract in this case was fully executed on both sides. The rights of the parties became fixed, and neither party can interfere with them by **pleading** the Statute of Frauds, (p. 330)."

So in Smith vs. Green, 41 Pac. 1022, the Supreme Court of California says: "The general rule, no doubt is, that one who rests his claim to an ease-

ment on a verbal contract done, **unexecuted** and **unaccompanied** by any other facts, has no rights thereto, which he can enforce. But there are many cases where a parol license which has been **executed,** and when investments have **been made** upon the faith of it, has been held irrevocable (Gould vs. Waters 323, 324 and cases there cited); and if the case at bar is to be determined alone upon the law governing parol grants, the rights of respondents, under the facts found, would be established by law." This case will be found as to facts exactly in point.

So in McLure vs. Koen, 53 Pacific, 1058, it is said: "Bar of Statute cannot avail against oral contract relating to reality, consideration having passed, the contract having been performed by both parties, and possession taken in pursuance thereto."

It will be seen from the complaint, that the oral contract, between the parties hereto, has been carried out and performed for at least forty years. Therefore no question can be raised by demurrer or answer of the Statute of Frauds.

The Company contracted to furnish the water (p. 5 Trans.) for Plaintiff's land and premises, and the same were furnished for more than forty years (Trans. p. 7), and the Plaintiff, and her predecessors in interest, expended large sums of money in pursuance of said contract and upon the faith thereof and particularly in the year 1913 (Trans. pp. 7 and 8) when said waters were being used by Plaintiffs and the said waters were flowing as always (Trans. p. 8) and there was plenty of water for the purposes of said contract (Trans. p. 8) and no loss or reduction of the quantity of water. When Defendants cut off, diverted and stopped the over-

flow of said waters and deprived the Plaintiffs from the use thereof. If this does not constitute a cause of action for damages, for the breach of the contract, then we can not and do not understand the law of contracts or damages. But the Court says (Trans. p. 18), "In other words, the Defendant failed to divert enough water from Marlette Lake to create an overflow and waste which would run down to Plaintiff's premises." How the Court can so find, we do not know, when the complaint clearly shows (Trans. p. 8) that there was plenty of water and no loss or reduction thereof, and the same was being used at that time. It had contracted that such "overflow" should be permitted, **continuously,** and without interference (Trans. p. 5). It had then contracted to keep up and permit such overflow, and the ruling of the Court upon demurrer is not in accordance with the facts set out in the complaint and the conclusion drawn by the Court cannot be sustained.

The other questions raised by the demurrer are not tenable and were not passed upon by the Court. That the oral contract has been fully performed, that large sums of money have been expended upon the faith thereof, makes the contract valid and binding and irrevocable, and Plaintiffs can sue for damages at law.

Garrett vs. Bishop, 41 Pac. 10.
Huff vs. McCauley, 91 American Dec. 203.
Flickenger vs. Shaw, 87 Cal. 126.
Gramshaw vs. Belcher, 88 Cal. 217.
De Graffenried vs. Savage, 47 Pac. 902.

It will be seen from the last above cited case, it matters not whether the issue here be an easement or a license, in any case, after the same become **executed,** it could not be revoked and if revocable the Defendant would be liable in damages, as shown by the authorities in our opening brief.

Now a license "Is a permission to do a certain act, or a series of acts upon another's land without acquiring an estate therein."

Section 981 Kinney on Irrigation, 2nd Edition.

"It may be given in writing or verbially, notwithstanding the Statute of Frauds."

Section 981 Kinney on Irrigation, 2nd Edition.

"If the licensee, under the authority of a parol license, for a consideration, makes large investments for the enjoying of the privilege, the licensor is held estopped from making a revocation."

Section 981 Kinney on Irrigation, 2nd Edition.

IV

We are making no claim of prescription or appropriation. We are relying upon our contract, and therefore appropriation or prescription cannot apply. They agreed to furnish the water. The contract was valid. They furnished the water forty years. It was running. The supply sufficient. They had the supply. It was their duty to furnish the water according to the contract. Without notice, without cause, the supply was cut off, to Plaintiffs' damages in the sum of $14,823.00. What excuse was there? None. Why this complaint fails to state a

cause of action we cannot see. A demurrer admits the facts pleaded. If there are any other facts, they must be set up by answer.

Respectfully submitted,

Sweeney & Morehouse

Attorneys for Appellants.